DEC 26 1973

MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

vs.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

APPELLEE'S RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT AND MOTION TO AFFIRM THE JUDGMENT BELOW OR, IN THE ALTERNATIVE, TO DISMISS THE APPEAL.

JEROME BARRON
ELIZABETH DuFRESNE
TOBIAS SIMON
1492 South Miami Avenue
Miami, Florida 33130
Attorney for Appellee
Pat L. Tornillo, Jr.

MIAMI REVIEW — 371-6853 — 577-3721

TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	8
STATEMENT OF THE CASE	8
THE QUESTIONS ARE SUBSTANTIAL —ISSUES PRESENTED	9
CONCLUSION	39
CERTIFICATE OF SERVICE	43

LIST OF CITATIONS

STATUTES AND CONSTITUTIONS

	Page
Alabama Code Tit. 17, §285 (1958)	40
Florida Constitution, Art I, §4	8
Florida Constitution, Art. III, §26	21
Florida Constitution, Art. VI, §1	8
Florida Constitution, Art. VI, §9	21
Florida Statutes, §104.38	2, 3, 4, 5, 7, 8, 9, 20, 32, 35, 36, 38, 39
Florida Statutes, §770.02	38
Federal Election Campaign Act, §104	6, 20
Mississippi Code of 1942, §3175	16, 17
15 U.S. Code, §1801, Newspaper Preservation Act	18
28 U.S. Code, §1257	5
28 U.S. Code, §1257(2)	2, 4, 5, 7

LIST OF CITATIONS (cont.)

Page

CASES

ACLU v. Jennings,
D.Ct. D.C., Nov. 14, 1973, 42 L.W. 2261 20

Allen v. Pioneer Press Co.,
40 Minn. 117, 41 NW 936 (1889) 38

Bay Guardian Co. v. Chronicle Publishing Co.,
344 F.Supp. 1155 (N.D. Calif. 1972) 19

Branzburg v. Hayes,
408 U.S. 665, 96 S.Ct. 2646 (1972) 30

Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune,
307 F.Supp. 422 (N.D. Ill. 1969) 34

Chicago Joint Board, Amal. Workers v. Chicago Tribune,
435 F.2d 470 (7th Cir. 1970) 34

Chronicle Gazette Publishing Co. v. Attorney General,
94 N.H. 148, 48 A.2d 478 (1946), Appeal Dismissed 329 U.S. 690 (1947) 22, 40

Columbia Broadcasting System, Inc. v. Democratic National Committee,
411 U.S. —, 93 S.Ct. 2080,
36 L.Ed.2d 772 (1973) 32, 33, 34

LIST OF CITATIONS (cont.)

Page

CASES

Construction Laborers v. Curry,
371 U.S. 542, 548-551 6

Curtis Pub. Co. v. Butts,
388 U.S. 130 (1967) 11

Gibson v. Florida Legislature Committee,
372 U.S. 539 (1963) 23

Gitlow v. People of New York,
268 U.S. 652 (1925) 37

Hanson v. Krehbiel,
68 Kan. 670, 75 P. 1041 (1904) 38

Houston v. Holmes,
202 Miss. 300, 32 So.2d 138, 139 17

Konigsberg v. State Bar,
366 U.S. 36 (1961) 23

Manasco v. Walley,
63 So.2d 91 (Miss. 1953) 16, 35

Mercantile Bank v. Langdeau,
371 U.S. 555 (1963) 7

Miller v. California,
36 L.Ed.2d 419 (1973) 26

LIST OF CITATIONS (cont.)

Page

CASES

Mills v. Alabama,
384 U.S. 214 (1965) 5, 6, 39

New York Times v. Sullivan,
376 U.S. 254 (1964) 10, 11, 12

Opinion of the Justices to the Senate,
298 N.E.2d 828 (Mass. 1973) 14

Pope v. Atlantic Coast Line R. Co.,
345 U.S. 379, 381-383 6

Red Lion Broadcasting Co. v. F.C.C.,
395 U.S. 367 (1969) 32

Richfield Oil Corp. v. State Board,
329 U.S. 69, 72-74 6

Rosenblatt v. Baer,
383 U.S. 75 (1966) 11

Rosenbloom v. Metromedia,
403 U.S. 29 (1971) 11, 12, 13

LIST OF CITATIONS (cont.)

Page

OTHER

Barron, *Access to the Press—A New First Amendment Right*, 80 Harv.L.Rev. 1641, 1676-1678 ..... 24, 25, 41

Barron, *An Emerging First Amendment Right of Access to the Media?*, *37 Geo. Wash. L.Rev.* 487 28

Barron, *Freedom of the Press for Whom?*, pp. 18-19 (Indiana University Press, 1973) 19

Emerson, *The System of Freedom of Expression*, 538-539 (1970) 15, 16

Gillmor and Barron, *Mass Communication Law* 279 (1969) 38

U.S. Congressional Record 1783 (1970) 18

In the Supreme Court of the United States

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
a division of
KNIGHT NEWSPAPERS, INC.,
Appellant,

vs.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

APPELLEE'S RESPONSE TO APPELLANT'S JURISDICTIONAL STATEMENT AND MOTION TO AFFIRM THE JUDGMENT BELOW OR, IN THE ALTERNATIVE, TO DISMISS THE APPEAL.

Appellee, Pat L. Tornillo, Jr., moves to affirm the judgment of the Supreme Court of Florida entered on July 18, 1973, (rehearing denied October 10, 1973), which reversed a decision of the Circuit Court of Dade County, Florida and upheld the constitutionality of § 104.38, Florida Statutes. In the alternative, Appellee moves to dismiss the appeal. Pursuant to Rule 16 of the Rules of this Court, Appellee has united a motion to affirm the judgment below, in the alternative, with a motion to dismiss the appeal. The motion is made in the alternative because it is not possible at this juncture to discern from Appellant's characterization in the jurisdictional statement of the issues in this appeal whether the opinion and judgment of the Florida Supreme Court are final for purposes of 28 U.S.C. § 1257(2). This response to Appellant's Jurisdictional Statement is also submitted to show that although the appeal does raise substantial federal questions for review in this Court, some of the federal questions stated in Appellant's Jurisdictional Statement as being presented by this appeal are not, in the view of the Appellee, either raised in this appeal or relevant to it.

OPINION BELOW

The opinion of the Florida Supreme Court, dated July 18, 1973, and the opinion denying rehearing dated October 10, 1973, both still unreported, are included in the Appendix to Appellant's jurisdictional statement as is the opinion of the Circuit Court of Dade County, reported at 38 Fla. Supp. 80 (1973).

JURISDICTION

This action was brought by Appellee Pat L. Tornillo, Jr., against *The Miami Herald*. Appellee Tornillo, a candidate for the State Legislature, requested that the *Herald* print verbatim his replies to two *Herald* editorials as required by Florida Statute 104.38. The *Herald* refused to comply with Florida Statute 104.38 and would not print the replies. Appellee then instituted suit for declaratory and injunctive relief and punitive damages. On October 20, 1972, the Circuit Court for Dade County dismissed the complaint and held § 104.38, Florida Statutes, to be in violation of the First and Fourteenth Amendments to the United States Constitution, and Article I of the Florida Constitution.

On direct appeal to the Florida Supreme Court, that Court reversed the decision of the Circuit Court and upheld, 6-1, the constitutionality of § 104.38, Florida Statutes. The Supreme Court of Florida found that the operation of the Florida right of reply law, F.S. § 104.38, did not "interfere with freedom of the press as guaranteed by the Florida Constitution and the Constitution of the United States." Indeed, the Supreme Court of Florida held that Florida Statute § 104.38 was not only consistent with the Constitutional guarantee of freedom of the press but strengthened that guarantee. *The Miami Herald* filed a Petition for Rehearing, which was denied by the Supreme Court of Florida on October 10, 1973. *The Miami Herald* filed a Notice of Appeal in this Court on November 1, 1973.

The Supreme Court of the United States has jurisdiction to review the decision of a state supreme court

upholding a state statute against a claim of constitutional invalidity pursuant to 28 U.S.C. § 1257(2). Jurisdiction is conferred, however, only if the judgment below is a "final judgment." Appellant contends that the "Florida Supreme Court conclusively decided the controlling constitutional issue, and its decision, which is binding upon the trial court, is therefore reviewable by this Court." Jurisdictional Statement of Appellant, p. 3. However, the constitutional issue presented for review to the Court on appeal will only be the "controlling constitutional issue" for the trial court on remand *if statutory construction and factual defenses are conceded by Appellant.* This has not been done by Appellant. Rather than conceding such defenses, Appellant appears, in its Jurisdictional Statement, to be laying the ground work for their assertion. Thus, Appellant contends that the particular replies submitted by Appellee were unresponsive and therefore not covered by Florida statute § 104.38. Also, Appellant professes to be unclear as to the meaning of the statutory term, "attack", which brings the Florida right of reply statute into operation. Appellant raises similar cavils with regard to the length, whereabouts, and content of the reply. See Jurisdictional Statement of Appellant, p. 21.

Appellee contends that Appellant should not be allowed to assert that the judgment below is sufficiently "final" for an appeal to this Court when appellant at the same time declines to state that it would print Appellee Tornillo's replies to its editorials if the controlling constitutional issue, the constitutionality *vel non* of Florida Statute § 104.38, were decided in this Court contrary to Appellant's position. Appellant is seeking to have the opinion treated as "a little bit final." It either is final or it is not.

Appellee invites the filing of a supplemental jurisdictional statement by Appellant to the effect that if this Court affirms the judgment below and sustains the constitutionality of F.S. §104.38, Appellant will print Appellee's replies. With the submission of a concession by Appellant that the only issue remaining in the case would be the constitutional validity of Florida Statute §104.38, the decision below would indeed be a "final" judgment pursuant to 28 U.S.C. §1257(2).

An analysis of *Mills v. Alabama*, 384 U.S. 214 (1965), is instructive on what Appellant needs to do, under the decisions of this Court, if this appeal is to be viewed as satisfying the "final" judgment rule of 28 U.S.C. §1257. In *Mills v. Alabama*, 384 U.S. 214 (1965), a state supreme court judgment was held to be a "final judgment" appealable under 28 U.S.C. §1257 even though the state supreme court had remanded the case for further proceedings not inconsistent with its opinion. In that respect, the mandate to the trial court from the Alabama state supreme court in *Mills* and the mandate of the Florida supreme court to the trial court in *Tornillo* were similar.

The state of Alabama in *Mills* moved to dismiss the appeal under §1257 on the ground that the state Supreme Court judgment in *Mills* was not "final". Mr. Justice Black, speaking for this Court, however, held that the case was final even though the state's argument had a "surface plausibility":

> "[i]*t is true the judgment of the State Supreme Court did not literally end the case. It did, however, render a judgment binding upon the trial court that it must convict Mills under this state*

> *statute if he wrote and published the editorial. Mills concedes that he did, and he therefore has no defense in the Alabama trial court.* Thus if the case goes back to the trial court, the trial, so far as this record shows, would be no more than a few formal gestures leading inexorably towards a conviction, and then another appeal to the Alabama Supreme Court for it formally to repeat its rejection of Mills' constitutional contentions whereupon the case could then once more wind its weary way back to us as a judgment unquestionably final and appealable. Such a roundabout process would not only be an inexcusable delay of the benefits Congress intended to grant by providing for appeal to this Court, but it would also result in a completely unnecessary waste of time and energy in judicial systems already troubled by delays due to congested dockets. The language of §1257 as we construed it in *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, 381-383, does not require a result leading to such consequences. See also *Construction Laborers v. Curry*, 371 U.S. 542, 548-551; *Richfield Oil Corp. v. State Board*, 329 U.S. 69, 72-74. Following those cases we hold that we have jurisdiction." *Mills v. Alabama*, 384 U.S. 214 at 217-218 (1966). (Emphasis supplied).

In other words, the Alabama Supreme Court judgment in *Mills* was "final" because Mills conceded that the only defense he had was a constitutional one. If the constitutional defense had been rejected by this Court, Mills would have been convicted in the trial court. But as has been pointed out, Appellant's Jurisdictional Statement in

this case, unlike the situation in *Mills*, appears to reserve a variety of nonconstitutional defenses. It may be that Appellant intends no such reservation and is quite prepared to concede that if Florida Stat. §104.38 is upheld as constitutional by this Court, it will publish the Appellee's replies. In that event, all that will be left for the trial court to do will be to order publication; just as in *Mills*, if the statute had been sustained by this Court, nothing would have been left for the trial court to do other than to hold Mills guilty under the statute. But as the matter now stands, it is not certain that the federal constitutional issue here is a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the Plaintiff's cause of action." *Mercantile Bank v. Langdeau*, 371 U.S. 555 at 557-558 (1963).

Appellee believes that it is necessary for Appellant to make a further statement on the question of whether they are reserving a variety of independent defenses of a factual and statutory construction nature. If a further statement from Appellant makes it clear that no such reservation of nonconstitutional issues yet remains, and the only issue that endures in this litigation is the constitutional validity of Florida Statute, §104.38, then, indeed, the decision below is a "final judgment" appropriate for review by appeal in this court pursuant to 28 U.S.C. §1257(2).

With the exception of the problem concerning the issue of finality which has been raised by Appellant's Jurisdictional Statement, the Appellee agrees that those federal constitutional issues that are presented by this appeal are clearly "substantial" and merit full review by the Supreme Court of the United States.

QUESTIONS PRESENTED

Does not Section 104.38, Florida Statutes, implement freedom of the press and due process of law guaranteed by the First and Fourteenth Amendments to the Constitution of the United States, and freedom of speech and press guaranteed by Article I, Section 4, of the Florida Constitution, by compelling a newspaper to provide free space to a candidate in any state election to reply to any publication in the newspaper which "assails (his) personal character," or charges him with "malfeasance or misfeasance" in office, or "otherwise attacks his official record"?

Is not Section 104.38, Florida Statutes, a valid exercise of the police power of the States as guaranteed by the Tenth Amendment to the Constitution of the United States as well as a valid exercise of the power of the Florida legislature to regulate elections as authorized by Article VI, Section 1 of the Florida Constitution?

STATEMENT OF THE CASE

With one exception, the Appellee accepts the statement of the case recited in the Appellant's Jurisdictional Statement. See Jurisdictional Statement of Appellant, pp 5-7. The Appellee, Tornillo, submitted two replies in response to two editorial attacks against him by Appellant, *The Miami Herald*. Appellant's statement, however, refers only to one reply submitted to it by Tornillo. Although the *Herald* failed to publish either reply, the *Herald* only informed Tornillo of its refusal to publish the second reply.

THE QUESTIONS ARE SUBSTANTIAL

Issues Presented

It is important to identify the truly substantial federal constitutional issues presented by this appeal. Two substantial federal issues are clearly present. First, does the Florida right of reply statute restrain freedom of the press or does it serve to guarantee and implement freedom of the press? Second, is Florida Statute, §104.38, a permissible regulation of freedom of the press because of the over-riding state police power purpose of assuring fair and honest elections?

Two different issues, on the other hand, are discussed at length in Appellant's Jurisdictional Statement as raising substantial constitutional questions. The first is the issue of whether the First Amendment *of its own force* provides any rights of access and reply to the public. The second is the issue of whether the Florida right of reply statute, §104.38 is unconstitutionally vague. Appellee submits that neither presents a substantial federal constitutional issue for consideration by this Court on this appeal.

1. *The Issue of Whether the Florida Right of Reply Statute Implements or Restrains Freedom of the Press Presents a Substantial Federal Constitutional Question*

This appeal involves the constitutionality of a state right of reply statute. The validity of right of reply legislation is a substantial federal question primarily because this Court has never had occasion to explicitly pass on the validity of such legislation. Courts, legislatures, and schol-

ars have assumed, Appellee believes correctly, the validity of such legislation. Yet in the absence of a specific Supreme Court holding on the subject, the status of right of reply legislation is placed under a pall despite the obvious responsiveness of such legislation to the First Amendment goals as articulated by the Court in *New York Times v. Sullivan*, 376 U.S. 254 at 270 (1964).

> "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open * * *"

After *New York Times v. Sullivan*, 376 U.S. 254 (1964), the following critique appeared of the rationale of that decision:

> "But it is paradoxical that although the libel laws have been emasculated for the benefit of defendant newspapers where the plaintiff is a 'public official,' the Court shows no corresponding concern as to whether debate will in fact be assured. The irony of *Times* and its progeny lies in the unexamined assumption that reducing newspaper exposure to libel litigation will remove restraints on expression and lead to an informed society.' But in fact the decision creates a new imbalance in the communications process. Purporting to deepen the constitutional guarantee of full expression, the actual effect of the decision is to perpetuate the freedom of a few in a manner adverse to the public interest in uninhibited debate. *Unless the Times doctrine is deepened to require opportunities for the public figure to reply to a defam-*

atory attack, the Times decision will merely serve to equip the press with some new and rather heavy artillery which can crush as well as stimulate debate."

Barron, *Access to the Press — A New First Amendment Right*, 80 Harv.L.Rev. 1641 at 1657 (1967).

(Emphasis supplied).

The scope of the *New York Times* rule was extended progressively from the elected public official to the non-elected public official, *Rosenblatt v. Baer*, 383 U.S. 75 (1966), to the public figure, *Curtis Pub. Co. v. Butts*, 388 U.S. 130 (1967). Finally, in *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971), the focal point of a First Amendment basis for protection for the media from libel litigation was placed on whether the alleged defamation involved public issues. This shift in the *New York Times v. Sullivan* rule from the status of the libel plaintiff to the content of the libel emphasized what previous cases in the rich case law decided under the *Sullivan* rule had hidden from view. The private citizen plaintiff who was now to be deprived of an effective libel remedy if the defamation he protected involved a public issue obviously would find it difficult to attract "media attention to counter criticism." The assumption that the libel plaintiff would be a sufficiently "public" person to defend himself in a spat with the media thus fell apart. In fact this Court, in *Rosenbloom*, per Mr. Justice Brennan, said as much:

"Thus, the unproven and highly improbable generalization that a yet defined class of 'public

> figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a need on which to rest a constitutional distinction."
> 403 U.S. 29 at 46-47.

In the light of the near demise of libel litigation as a result of the rise of the public law of libel, and in the light of the uneven contest between the search for access by both private and "public" persons assailed by powerful media foes, the plurality opinion for the Court in *Rosenbloom* suggested the efficacy of right of reply legislation as a corrective for the media overkill that the *New York Times v. Sullivan* doctrine had spawned.

It is within the context of this background that the Florida right of reply statute was sustained in the judgment below. The Supreme Court of Florida assumed that the advocacy of right of reply legislation by the plurality opinion for the Court was an implicit endorsement of the constitutional validity of right of reply legislation. See *Tornillo v. Miami Herald Publishing Co.*, Case No. 43,009, Per Curiam Slip Opinion, pp. 8-9, July 18, 1973.

Certainly there was no suggestion in Mr. Justice Brennan's plurality opinion for the Court in *Rosenbloom*, in which Chief Justice Burger and Mr. Justice Blackmun joined, of any constitutional infirmity with regard to right of reply legislation. The plurality opinion for the Court in *Rosenbloom* called upon the states to ensure the "ability to respond" of citizens who otherwise might have inadequate ability to secure publicity for their ideas. The call for such legislation would only be meaningful if its consti-

tutionality were assumed. See *Rosenbloom v. Metromedia*, 403 U.S. 29 at 47. Furthermore, in a footnote in *Rosenbloom*, the Court discussed, with apparent approval, the practice of those states which "had adopted retraction statutes or right of reply statutes." 403 U.S. 29 at 47, n. 15. Similarly, in the same footnote, the Court appeared to consider the enforcement of right of reply legislation as an appropriate task for "constitutional adjudication." In a dissenting opinion in *Rosenbloom*, Mr. Justice Harlan called attention to the implicit assumption of constitutionality which the members of this Court, who joined in the plurality opinion for the Court in *Rosenbloom*, had apparently extended to right of reply legislation. 403 U.S. 29 at 71 (1973).

Florida found itself in the *Tornillo* case with a right of reply law, enacted in 1913, which appeared to meet precisely the kind of legislative standard which the plurality opinion in *Rosenbloom* had suggested as the appropriate remedy to enable both private and public persons "to respond through the media."

Is such a statutory remedy constitutional?

There is no express holding on this point commanding a majority of this Court. As a result, the question of the validity *vel non* of the Florida right of reply statute under the First Amendment, is a substantial federal constitutional issue.

The position that any kind of compulsory publication obligation on the press is a violation of freedom of the press has secured some recent support. The Supreme Judicial Court of Massachusetts has recently held unconstitu-

tional, in an advisory opinion, a pending legislative proposal that if a newspaper published the paid political advertisement of one candidate, it must publish the paid political advertisement of all other candidates for that office. The proposed bill also would have provided if a newspaper published a paid political advertisement "designed or tending to defeat any position with respect to a question to be submitted to the voters, he must publish any paid political advertisement on any other position with respect to the same question." This provision was also declared unconstitutional. See *Opinion of the Justices to the Senate*, 298 N.E.2d 828 (Mass. 1973).

The Massachusetts Supreme Judicial Court said with respect to the validity under the First Amendment of the proposed legislation:

> "We are aware of no circumstances in which it has been held that the First Amendment right of free speech gives a private individual the right to require the publication of editorial advertising." 298 N.E.2d 828 at 833 (Mass. 1973).

The Supreme Court of Florida, on the other hand, viewed the Florida right of reply law as implementing a basic value "underlying First Amendment guarantees" which is the "broad societal interest in the free flow of information." The great distinction in terms of First Amendment values between an obligation to provide a reply and a state statute specifically restraining content was underscored by the Supreme Court of Florida:

> "The statute here under consideration is designed to add to the flow of information and ideas and

> does not constitute an incursion upon First Amendment rights or a prior restraint, since no *specified newspaper content is excluded.* There is nothing prohibited but rather it requires, in the interest of full and fair discussion, additional information."
>
> *Tornillo v. The Miami Herald*, Supreme Court of Florida, Per Curiam Slip Opinion, Case No. 43,009, p. 6, July 18, 1973.

Right of reply legislation has been perceptively and sympathetically discussed by at least one distinguished First Amendment commentator, Professor Thomas I. Emerson. See Emerson, *The System of Freedom of Expression*, 538-539 (1970). Despite Appellant's citation of Emerson in its Jurisdictional Statement, there is nothing in Professor Emerson's treatise which suggests the unconstitutionality under the First Amendment of right of reply legislation. On the contrary, Professor Emerson has written that a right of reply "would strengthen and vitalize" freedom of expression:

> "There are other devices for protecting the individual that are not only consistent with a system of freedom of expression but that would strengthen and vitalize it. The most significant is a right of reply. The advantages of this way of dealing with alleged defamatory statements have been set forth by others and will not be considered in detail here. It is sufficient to note that a right of reply could be made available in most situations in which an individual claims that false assertions (and other forms of attack on him) have been made. It is

> particularly applicable in the case of the press, where abandonment of the libel action would be felt the most. Such a procedure is the most appropriate and probably the most effective way to deal with the problem. The person attacked would have an opportunity to get his position and his evidence quickly before the public. He would have a forum in which to continue the dialogue, rather than being forced to withdraw to the artificial arena of the courtroom. The discussion would thus be kept going in the marketplace, and the issues left up to the public, which must make the final decision anyway."

Furthermore, Professor Emerson assumes that the appropriate procedure for "allowing a right of reply would probably have to be established by legislation rather than judicial decision." *Id.* at 539.

It is to be noted that in a construction of the Mississippi right of reply statute by the Supreme Court of Mississippi where the court gave very careful attention to defining the statute, the Mississippi Supreme Court was altogether silent with regard to any First Amendment objections to right of reply legislation. See *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953). A close reading of the Mississippi Supreme Court's construction of the Mississippi right of reply statute demonstrates that that Court provided the statute with a gloss which was entirely consistent with First Amendment and due process standards:

> "The provisions of Section 3175, Code of 1942, are penal in their nature, and the statute should be strictly construed. Statutes creating liabilities

which did not exist at common law, 'although supposed to be founded on considerations of public policy and general convenience are not to be extended beyond the plain intent of the words of the statute." *Houston v. Holmes*, 202 Miss. 300, 32 So.2d 138, 139. The Court in interpreting a statute of this kind must look to the statute itself for the legislative intent, and the words of the statute must be given their usual and ordinary meaning. Section 3175, according to the language used, applies only in cases where the newspaper article complained of reflects upon the honesty, integrity or moral character of the candidate; and the Court cannot by judicial interpretation extend the liability imposed by the statute to cases involving other types of objectionable newspaper comment or criticism, which do not fall clearly within the language used in the statute." 63 So.2d 91 at 96 (1953).

Mississippi and Florida are presently the only American States having right of reply statutes.

The general approach to right of reply legislation by scholars and courts has been to assume the constitutionality of such legislation. It is important to bear in mind that legislation in aid of First Amendment values is not unusual. *Furthermore, it should be emphasized that the press has occasionally favored such legislation.*

There is an ambivalent aspect to the print media's claim that legislation in aid of First Amendment values is unconstitutional. The strength of print media feeling on the subject of this litigation is demonstrated by the num-

ber of amicus briefs filed in this Court and the Supreme Court of Florida on behalf of newspapers and other media. The fact is that the print media has been somewhat two-faced on the subject of the constitutionality of governmental legislation in aid of a free press. There is a bogus quality to much of the newspaper clamor on the subject of right of reply legislation. This is demonstrated by the widespread newspaper support for the Newspaper Preservation Act, 15 U.S.C. §1801. As a result of that legislation enacted by Congress in 1970, 22 cities were allowed to set joint advertising subscription rates which might otherwise be deemed to have violated the antitrust laws. One of the newspapers directly benefiting from this governmental legislation aiding the press is the Appellant, *The Miami Herald*, which has been party to a joint operating agreement since 1966 and is therefore one of the most conspicuous beneficiaries of government largesse under the Newspaper Preservation Act.

For a list of the various agreements protected by the Act and the date the agreements became effective, see 116 Cong. Rec. 1783 (1970).

What is the legislative policy behind the Newspaper Preservation Act's exemption from the anti-trust laws for pre-existing joint operating rates between newspapers in the same community? The justification is that an anti-trust violation should be excused in the interest of encouraging diversity of opinion by preserving two separate editorial voices in a community. If government legislation to preserve editorial diversity in a city is constitutional, state right of reply legislation designed to encourage debate and accurate information in the daily press with regard to political contests is also constitutional. Surely,

one of the legal ironies of contemporary First Amendment litigation is the furious assault by the Appellant and its kindred chain newspapers throughout the country on the judgment below sustaining Florida's statutory right of reply legislation when the Appellant is itself one of the principal beneficiaries of legislation designed to aid the press in order to serve debate:

> "If passage of the failing newspaper act was rooted in a concern that as many communities as possible should continue to have two editorial pages to read, then the Newspaper Preservation Act is federal legislation designed to provide for diversity of opinion. But if Congress has constitutional power to enact legislation to encourage diversity of viewpoint in the press, then Congress can enact legislation to give readers rights of access to the press. The scope of legislation to assure diversity of expression cannot fairly or logically be limited to serving the interests of publishers to the exclusion of the newspaper public."
>
> Barron, *Freedom of the Press for Whom?* pp. 18-19 (Indiana University Press, 1973).

Right of reply legislation is no more or less unconstitutional than is the Newspaper Preservation Act. (The Newspaper Preservation Act was recently sustained against a constitutional challenge.) See *Bay Guardian Company v. Chronicle Publishing Co.*, 344 F.Supp. 1155 (N.D.Calif. 1972).

The key to distinguishing legislation which serves First Amendment ends from legislation which does not is whether discussion is enhanced or inhibited by the legislation in question. Recently, a three judge district court invalidated §104(b) of the Federal Election Campaign Act which prohibits certain media advertising on behalf of candidates for federal office unless the candidate certifies that the cost of such advertising will not exceed campaign spending limit. *ACLU v. Jennings*, United States District Court for the District of Columbia, November 14, 1973, 42 LW 2261. The three judge federal court invalidated the statute and the regulations under it as facially unconstitutional. The three judge court said:

> "*A major purpose of the First Amendment is to protect the free discussion of governmental affairs. This includes discussions of candidates, and all matters relating to political processes. Any attempt to limit the free unfettered dissemination of individual opinion cannot be favorably viewed.*" (Emphasis supplied).

The Florida right of reply statute "protects the free discussion of governmental affairs." The substantial federal constitutional issue for resolution by this Court is whether legislation such as §104.38, Florida Statutes, violates the First Amendment, as Appellant contends, or implements it, as Appellee believes.

2. *The Question of Whether Florida Statute, §104.38, Is a Permissible Regulation Of Freedom of the Press Because of the Over-riding State Police Power Purpose of Assuring Fair and Honest Elections Presents a Substantial Federal Constitutional Issue*

An exercise of police power of the State under the Tenth Amendment is particularly appropriate when state legislation involved is designed to assure the integrity of the state electoral process. As the Florida Supreme Court pointed out in its decision in the judgment below, "Article III, Section 26, and Article VI, Section 9, Constitution of Florida, 1885, commanded the Legislature to pass laws 'regulating elections and prohibiting under adequate penalties, all undue influence thereof from power, bribery, tumult or other improper practices' and to 'enact such laws as will preserve the purity of the ballot given under this Constitution.'" Pursuant to this state constitutional mandate, the right of reply statute here at issue was enacted:

> "The statutory provision, the constitutionality *vel non* which is being questioned in the instant cause, was enacted not to punish, coerce, or censor the press but rather as a part of a centuries old legislative task of *maintaining conditions conducive to free and fair elections.* The Legislature in 1913 decided that owners of the printing press had already achieved such political clout that when they engaged in character assailings, the victim's electoral chances were unduly and improperly diminished. To assure fairness in campaigns, the assailed candidate had to be provided with an equivalent opportunity to respond; otherwise not only the candidate would be hurt *but also* the people would be deprived of both sides of the controversy."

Tornillo v. The Miami Herald Publishing Co., Supreme Court of Florida, Case No. 43,009, Per Curiam, Slip Opinion, pp. 3-4, July 18, 1973

Even if the Florida right of reply statute were regarded as an infringement of freedom of the press (albeit Appellee believes the statute to be an implementation thereof), there is no question that the statute is a constitutionally permissible infringement. Regulation of the press on behalf of the undoubted police power interest of the state in assuring free and fair elections is not an unusual doctrine. Other state supreme courts have upheld state regulation of the press when the purpose of the legislation at issue was designed to protect the integrity of the electoral process. In *Chronicle Gazette Publishing Co. v. Attorney General*, 94 N.H. 148, 48 A 2d 478 (1946), appeal dismissed 329 U.S. 690 (1947), the Supreme Court of New Hampshire upheld a state statute which provided that the rate for political advertising in newspapers should not be in excess of the rates charged for commercial advertising. Speaking for the New Hampshire Supreme Court, Mr. Justice Kenison said:

> "It is not necessary to consider the extent to which such legislation may go but so long as it does involve expression or censorship, the regulation of newspapers is as broad as that over * * * private business." 94 N.H. at 153, 48 A.2d at 482.

The common thread that unites the *Chronicle* case and this case is that neither the statute reviewed by the New Hampshire Supreme Court nor the statute reviewed by the Florida Supreme Court in any way restricted news-

paper content. Both statutes were enacted to aid political expression. The Florida right of reply statute enjoys the fortunate constitutional status of being a legitimate exercise of the state police power which also serves First Amendment objectives. The Florida right of reply statute has as its legislative purpose the same compelling and over-riding state purpose that underlies the whole Florida election code: fair, honest, and informed elections.

But it should be borne in mind that even if this Court were to take the view that legislation designed to implement First Amendment values is nonetheless impermissible under the First Amendment, the Florida right of reply statute would still be valid because of the strength of the police power purpose which animates it. In such circumstances, even if an infringement on First Amendment values were held to have occurred, the infringement would be deemed an incidental one and the compelling state interest in providing the electorate with both sides of a dispute between the press and a political candidate during a campaign would prevail. An incidental restraint on freedom of expression will be sustained where a compelling governmental interest can be demonstrated. *Gibson v. Florida Legislative Committee*, 372 U.S. 539 (1963); *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

Examples of statutory regulation of the press abound. Such regulation falls into at least eight categories with respect to state legislation impinging on freedom of the press. This legislation relates to (1) paid political advertisements, (2) anonymous publicity, (3) legislative publicity, (4) lotteries, (5) polling places, (6) divorce, (7) retraction, (8) and crimes involving sex.

The test of the First Amendment validity of such legislation is the strength of the state police power interest which is involved in the particular statutory regulation of the press. Relevant to this point is *Opinion of the Justices to the Senate*, 298 N.E.2d 828 (Mass. 1973), where the Massachusetts Supreme Judicial Court invalidated a statute compelling publication of all paid political ads running for a particular office, where one such paid ad for a candidate for that office had been published.

One of the reasons the Supreme Judicial Court of Massachusetts gave for invalidating the proposed political advertising legislation presented to it for an advisory opinion, was that the bill appeared to the Court to go beyond any legitimate police power interest:

> "The situation at which §39A is directed may be the "monopolistic" status of certain news publications. However, compulsion to publish all responsive political advertisements, applicable to all newspapers and other publications of general circulation in the Commonwealth, *goes beyond what is essential to the furtherance of any interest of a State in its citizens having a right of access to newspapers in order to express, at their expense, political ideas which otherwise would not be published.* See Barron, *Access to the Press — A New First Amendment Right*, 80 Harv.L. Rev. 1641, 1676-1678. Indeed, no set of circumstances may exist which would support a legislative mandate that a newspaper or other publication of general circulation must publish a political advertisement. The views expressed and implied in the opinion of the court and in the dis-

senting opinions in the *Pittsburgh Press Co. case, supra*, create substantial doubt that such legislation would pass constitutional muster."
298 N.E.2d 828 at 835 (1973).

The passage cited by the Supreme Judicial Court of Massachusetts in Barron, *Access to the Press — A New First Amendment Right*, 80 Harv. L. Rev. 1641 at 1676-1678 (1967), emphasizes the need to develop a contextual approach in enforcing a right of access, appropriate to the needs of each state as its legislature envisioned them.

> "The right of access might be an appropriate area for experimental, innovative legislation. The right to access problems of a small state dominated by a single city with a monopoly press will vary, for example, from those of a populous state with many cities nourished by many competing media. These differences may be more accurately reflected by state autonomy in this area, resulting in a cultural federalism such as that envisaged by Justice Harlan in the obscenity cases."

Id. at 1676.

> "Utilization of a contextual approach highlights the importance of the degree to which an idea is suppressed in determining whether the right to access should be enforced in a particular case."
> *Id.* at 1676-1678.

These ideas comport well with the new emphasis on federalism that has recently been accorded by this Court to the obscenity area. *Miller v. California*, 93 S.Ct. —, 36 L.Ed.2d 419 (1973).

The obscenity analogy highlights the validity of right of reply legislation. The task of courts construing obscenity legislation is to ascertain whether publications should be suppressed. The task of the courts in the area of right of reply and access legislation is whether opinions which have been suppressed should come to light. The latter task should certainly be considered more congenial to First Amendment purposes:

> "That an emerging right of access can, at least to begin with, best be handled in the courts is supported by analogues in other sensitive constitutional areas. For example, in *Jacobellis v. Ohio* the Supreme Court squarely held that the question of what is "obscenity" is a constitutional question to be decided by judges rather than government administrators or juries. Relying on Lockhart and McClure's observation that judges have no special qualities which entitle them to choose which "movies are good or bad for local communities," the Court nevertheless supported the following conclusion about judges:
>
> > But they [the judges] do have a far keener understanding of the importance of free expression than do most government administrators or jurors, and they have had considerable experience in making value judgments of the type required by the constitutional standards

> for obscenity. If freedom is to be preserved, neither government censorship experts nor juries can be left to make the final effective decisions restraining free expression. Their decisions must be subject to effective, independent review, and we know of no group better qualified for that review than the appellate judges of this country under the guidance of the Supreme Court.

In holding in *Jacobellis* that obscenity is a question of constitutional law of the highest order, the Court really accepted the views on this point which had been argued by Mr. Justice Harlan in *Roth v. United States:*

> Every communication has an individuality and "value" of its own. The suppression of a particular writing or other tangible form of expression is, therefore, an *individual* matter, and in the nature of things every such suppression raises an individual constitutional problem, in which a reviewing court must determine for *itself* whether the attacked expression is suppressible within constitutional standards.

If the suppression of a communication on grounds of obscenity is a question of such constitutional significance that it insists on judicial treatment, then certainly the issue of whether a particular group ought to be permitted an opportunity for expression — for participation in the life of ideas — is also a question solvable by judges."

Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 Geo. Wash. L. Rev. 487 at 495-496 (1969).

Right of reply legislation, like obscenity legislation, is an appropriate exercise of the state police power. The substantial federal constitutional question presented for this court is whether, assuming that §104.38, Florida Statutes, constitutes an impingement on freedom of the press, the state interest in the statute is a compelling one. It should be noted that the Massachusetts Supreme Judicial Court, although it struck down a compulsory publication statute, apparently left the door open for the consideration of right of access legislation justified by a compelling state interest. See *Opinion of the Justices to the Senate*, 298 N.E.2nd 828 at 835 (Mass. 1973). (See italicized portion at page 24, *supra*.)

The substantial federal constitutional issue presented to this Court is whether Florida's right of reply law is justified by a compelling state interest. The difference between the Massachusetts proposed statute and the Florida right of reply statute is that the right of reply statute is invoked only when the paper itself has launched an attack on the candidate. When the power, prestige and influence of a powerful daily is launched against a candidate for office, the problem of his inability to respond is far greater than when the paper decides to sell an ad to his opponent but not to him. On the subject of media power and individual inability to respond to it the Supreme Court of Florida's observations in justification of the police power and the First Amendment validity of §104.38 as applied to the facts in this case are significant and relevant:

"The right of the public to know all sides of a controversy and from such information to be able to make an enlightened choice is being jeopardized by the growing concentration of the ownership of the mass media into fewer and fewer hands, resulting ultimately in a form of private censorship. Through consolidation, syndication of radio and television stations and the demise of vast numbers of newspapers, competition is rapidly vanishing and news corporations are acquiring monopolistic influence over huge areas of the country. *We take note of a recent article in Florida Trend magazine, March 1973, explicating that the Miami Herald is the largest newspaper published in Florida, that it is larger in size than the next two largest newspapers; and that it is not only a large city daily newspaper but also is a regional and international newspaper.*

Freedom of expression was retained by the people through the First Amendment *for all the people* and *not merely for a select few.* The First Amendment *did not create a privileged class* which through a monopoly of instruments of the newspaper industry would be able to *deny to the people the freedom of expression* which the First Amendment guarantees."

Tornillo v. Miami Herald, Supreme Court of Florida, Case No. 43,009, Per Curiam, Slip Opinion, pp. 6-7, July 18, 1973. (Emphasis added)

In *Branzburg v. Hayes*, 408 U.S. 665, 96 S.Ct. 2646 (1972), the Supreme Court held that the First Amendment did not provide of its own force either an absolute or qualified privilege authorizing newsmen to refuse to testify before a grand jury. But the fact that the First Amendment did not authorize judicial creation of newsmen's privilege did not mean that the states were not free to enact newsmen's shield statutes. Appellant's Jurisdictional Statement assumes first, that the First Amendment does not permit the judicial creation of a right of access, and, second, that, therefore, it follows that a statutory right of reply is unconstitutional. The first assumption involves an issue not raised by this appeal. The second assumption is not supported by American constitutional law or by traditional legal logic. The statement of the scope under the police power accorded the states to fashion newsmen's shield or privilege legislation by this Court in *Branzburg* is entirely descriptive of the constitutional propriety and legitimacy of right of reply legislation:

> "At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to address the evil discerned and, equally important, to re-fashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we

are powerless to erect any bar to state courts responding in their own way and construing their own constitutions so as to recognize a Newsmen's privilege, either qualified or absolute." 96 S.Ct. 2646 at 2669 (1972).

Even if right of reply legislation be deemed a First Amendment impingement, legislation affecting the press to secure an over-riding state interest under the police power has long been sustained. Moreover, right of reply statutes like newsmen's shield statutes have the additional constitutional merit of being legislation designed to enhance rather than diminish the flow of information.

In summary, the question of whether Florida's right of reply law is a valid exercise of the state police power, consistent with the First Amendment, presents this Court with a substantial federal constitutional issue. A clear resolution of that issue in favor of the validity of such legislation would do much to alleviate the "chilling effect" on the future of a limited statutory right to free debate. The future of such legislation has been clouded by exaggerated and hostile media publicity with regard to decision of the Florida Supreme Court's decision sustaining §104.38 as valid under the First Amendment.

3. *Questions of Whether the Fairness Doctrine Applies to the Press Or Whether the First Amendment of Its Own Force Provides the Public With Rights of Access and Reply to the Press Are Not Raised by This Appeal And Do Not Present This Court With a Substantial Federal Constitutional Issue For Resolution At This Time*

The issues in this appeal are difficult and sufficiently complex without the addition of issues not in the case and, without placing in the mouth of Appellee, arguments he has never made. For example, Appellant says "Tornillo has sought to bring himself within the ambit of the Federal Communications Act's fairness doctrine and the personal attack rules of the Federal Communications Commission, urging that these doctrines can and should be applied to newspapers." Jurisdictional Statement of Appellant, p. 8. Nowhere in his briefs or pleadings before the Florida Courts has Tornillo made any such claim. He has predicated his right to reply solely on the Florida statute which gives him such a right. Clear understanding of the issues involved here is not aided by inflating Appellee's legal position to cover issues not involved in this litigation. Where reference has been made to the fairness doctrine and its corollary, the personal attack rules, it has been solely for purposes of analogy to demonstrate that where the legislation by statute has provided a structure for debate, the First Amendment is not inhibited but implemented. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Appellant asserts that the *per curiam* decision of the Supreme Court of Florida upholding the Florida right of reply statute, Sec. 104.38, Florida Statutes, is in conflict with prior cases in this and other courts. Thus, Appellants contend that the Florida right of reply statute is "in fundamental and irreconcilable conflict with the principles underlying this Court's decision in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 411 U.S. ____, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973)."

Even the most cursory analysis makes it impossible to view the *CBS* case and the *Tornillo* case as in conflict. One case, the *Tornillo* case, involves a limited right of reply set forth in a statute. The circumstances for the application of the right of reply conferred by the statute are carefully circumscribed. Moreover, the statute has now had the benefit of a precise, limiting and authoritative judicial gloss by the highest Court of the state.

In the *CBS* case, at least as the FCC and the Supreme Court viewed the issues, nothing in the federal statutes or in FCC decisions or regulations justified the recognition of a limited right of access to public television time. In other words, the access to editorial advertising claim was grounded on the First Amendment itself, there was no statute providing access rights. In fact, the constitutional future of a limited right of access to the broadcast media was obviously kept open by the plurality opinion for the Court in *CBS*. Chief Justice Burger specifically said for the Court that the issue of constitutionality of a regulation or statute conferring a limited right of access to editorial advertising was left unresolved. In fact, the absence of a statute in the *CBS* case was one of the touchstones of decision in that case and it is surprising that in all of Appellant's extensive references to the case they never mentioned this distinguishing factor.

> "We do not read the question whether the First Amendment or the Act can be read to preclude the Commission from determining that in some situations the public interest requires licensees to re-examine their policies with respect to editorial advertisements. *The Commission has not yet made such a determination;* it has, for the

> present at least, found the policy to be within the sphere of journalistic discretion which Congress has left with the licensee."
>
> *CBS v. Democratic National Committee*, 411 U.S. —, 93 S.Ct. 2080 at 2094 (1973).

Appellants similarly rely on *Chicago Joint Board, Amal. Workers v. Chicago Tribune*, 435 F.2d 470 (7th Cir. 1970), where judicial recognition was denied to a right of access, predicated on the First Amendment, to publish an editorial advertisement submitted by a union with regard to its version of a labor dispute. Appellant says the *Chicago Joint Board* case and the *Tornillo* case involve "essentially similar" arguments. This is not true. As Judge Marowitz said in the lower court opinion which was offered in *Chicago Joint Board:*

> "If, in fact, concentrations of private media power are stultifying, the appropriate approval to secure a *right of access would be by 'experimental innovative legislation'* or Constitutional Amendments."
>
> *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune*, 307 F.Supp. 422 (N.D.Ill. 1969).
> (Emphasis supplied.)

On appeal, the Court of Appeals in *Chicago Joint Board* directed its attention to the issue of whether the First Amendment of its own force provided any right of access to the press. Intriguing and complicated as that issue may be, it is not an issue in this proceeding. The issue herein is far narrower and more parochial. It is

whether a state statute, enacted within the sphere of the legitimate exercise of state police power and designed to insure the integrity of the state electoral process, which gives a limited right of reply in the press to political candidates who have been attacked therein, offends or implements the First Amendment.

Every single case which Appellant cites as being in conflict with the decision below is a case where an access argument rested on the First Amendment itself and where the argument was resisted vis-a-vis the privately-owned press because of the state action problem. The truth is that the only case cited in Appellant's Jurisdictional Statement which even involves a right of reply statute is *Manasco v. Walley*, 63 So.2d 91 (Miss. 1953), a case where the Mississippi Supreme Court implicitly upheld the constitutionality under the First Amendment of its right of reply statute. *Manasco v. Walley, supra*, p. 96.

The issue of whether the First Amendment should by judicial interpretation be utilized to provide a right of access to the press is a fascinating and difficult constitutional issue. But it is not an issue involved in this litigation. The substantial federal constitutional here is the validity *vel non* of the Florida right of reply law, §104.38, Florida Statutes.

4. *Appellant's Vagueness Objections to §104.38, Florida Statutes, Do Not Present a Substantial Federal Constitutional Question*

Appellant contends that §104.38, Florida Statutes, is unconstitutionally vague and ambiguous. The Supreme Court of Florida has adequately and curatively responded to these contentions. In the light of the interpretive gloss

put on the statute in controversy by the judgment below, challenges to the statute based on vagueness and statutory ambiguity simply do not constitute substantial federal questions. The Supreme Court of Florida held that the Florida right of reply statute was sufficiently explicit to inform those who were within the reach of the statute to be able to ascertain the conduct necessary on their part to avoid the ban of the statute. In an effort to meet overbreadth and vagueness contentions, the Supreme Court of Florida gave the following definitive interpretation to the statute:

> "Because of the longstanding policy of this Court to give a statute, if reasonably possible, a construction supporting its constitutionality, we hold that the mandate of the statute refers to 'any reply' which is wholly responsive to the charge made in the editorial or other article in a newspaper being replied to and further that such reply will be neither libelous nor slanderous of the publication nor anyone else, nor vulgar, nor profane." *Tornillo v. The Miami Herald Publishing Co.*, Supreme Court of Florida, Case No. 43,009, Slip Opinion, Per Curiam, p. 10, July 18, 1973.

After the decision of the Supreme Court of Florida was announced in the *Tornillo* case, Appellant, joined by many other newspapers, who filed amicus curiae briefs, filed a petition for rehearing with the Supreme Court of Florida. Appellant contended in its petition for rehearing that §104.38 was a criminal statute and as such that it failed to meet the constitutional standards of precision required of such statutes. Appellant argued on rehearing that the Supreme Court of Florida lacked constitutional power to furnish a saving gloss to a criminal statute.

Appellant also returned to its general contentions about vagueness saying that the statute presented problems of construction which the Supreme Court of Florida left unanswered. The Supreme Court of Florida denied the petition and pointed out that "no criminal penalty" was sought by Tornillo and that "the validity *vel non* of the criminal penalty is not here involved." *Pat L. Tornillo, Jr. v. The Miami Herald Publishing Company*, Case No. 43,009, Petition for Rehearing, Slip Opinion, p. 2, October 10, 1973. The Supreme Court of Florida also pointed out that in order to give a savings construction to a statute the criminal sanction provisions of a statute could be severed if this were necessary to save the statute from constitutional infirmity. For this proposition the Supreme Court of Florida cited the leading First Amendment case of *Gitlow v. People of New York*, 268 U.S. 652 (1925).

On the petition for rehearing, the Supreme Court of Florida addressed itself to the Appellant's hypothetical questions concerning the interpretation of the statute, *i.e.*, What is a response? An assault? "A conspicuous place"? etc. First, the Supreme Court of Florida pointed out in effect that the definition of words in a statute will always be a matter of mystery to those in whose interest it is to profess to be perplexed. Yet the Supreme Court of Florida remarked on the marvelous ability of the Florida newspaper industry to understand completely similar statutory phraseology when such understanding was in its interest. Thus, the Supreme Court of Florida pointed out that Florida has a retraction statute, §770.02, Florida Statutes, as do many other states, and that the Florida retraction statute contains words such as "good faith", "falsity", "a full and fair correction", "apology", and "conspicuous place." Nevertheless, the Florida retraction statute has had suffi-

cient clarity to have frequently been used by Florida publishers to avoid punitive damages. The Florida retraction statute, §770.02, contains similar phraseology to that found in the Florida right of reply statute, §104.38. The retraction statute involves compulsion no less than the right of reply statute. The choice given to the publisher is that between publication of retraction or the assessment against him of punitive damages. Yet the constitutionality of retraction statutes is generally assumed:

> "The constitutionality of the Minnesota (retraction) law has been sustained, *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N.W. 936 (1889), while some state statutes have been declared unconstitutional. *Hanson v. Krehbiel*, 68 Kan. 670, 75 P. 1041 (1904). Courts which have regarded retraction laws unfavorably have done so because they believe the general constitutional protection of life, liberty and property prohibit such laws, the defamed person is denied a speedy recovery for injury to his reputation, and, more important, retraction statutes represent class legislation favoring the press and denying the equal protection of the laws."
>
> Gillmor and Barron, *Mass Communication Law* 279 (1969).

It is thus to be noted from this excerpt that such attacks as have been launched against state retraction statutes have not been of a vagueness nature. In short, Appellant's vagueness objection to the Florida right of reply statute, which contains similar phraseology to that employed by the Florida retraction statute, does not raise a substantial federal constitutional issue.

CONCLUSION

Appellant seeks to undercut the clear police power justification for the Florida right of reply statute, the legitimate state interest in ensuring free, fair and honest elections, by relying on *Mills v. Alabama*, 384 U.S. 214 (1966), for the proposition that such a state interest cannot justify a First Amendment resolution of the kind they believe §104.38 to constitute. Thus appellant asserts:

> "This Court held in *Mills v. Alabama*, *supra*, that the reasonableness of a state's interest in fair elections cannot justify a criminal statute restricting the contents of a newspaper. *Mills* was ignored by the Supreme Court of Florida."
> Jurisdictional Statement of Appellant, p. 16.

These contentions are incorrect for a variety of reasons. First of all, as has been made clear by the court below, no criminal provisions of §104.38 are involved in or raised by this appeal. Second, and most important, the Florida right of reply statute unlike the statute in *Mills* does not involve "restricting the contents of a newspaper."

Mills v. Alabama, *supra*, is completely consistent with the decision below. The following discussion of *Mills v. Alabama* is cited to illustrate that legislation which enhances free press implements the First Amendment and does not violate it:

> "A recent United States Supreme Court case, *Mills v. Alabama*, 384 U.S. 214 (1966), places new significance on opportunity for reply in the press and thus provides by implication new sup-

port for a statutory right of access to the press. In *Mills*, as in *Chronicle*, the state legislature had regulated newspapers under a state corrupt practices act. The Alabama statute, Ala. Code Tit. 17, §285 (1958), made it a criminal offense to electioneer or solicit votes 'on the day on which the election affecting such candidates or propositions is being held.' The *Birmingham Post Herald*, a daily newspaper, carried a very strong editorial urging the electorate to adopt a mayor-council form of government in place of the existing commission form. The editor of the newspaper, who had written the editorial, was arrested on a charge of violating the statute. The trial court sustained a demurrer to the complaint, but the Supreme Court of Alabama reversed on the ground that reasonable restriction of the press by the legislature was permissible.

In reversing this decision, Justice Black's opinion for the Supreme Court was based on the familiar concept that the press is a kind of constitutionally anointed *defensor fidei* for democracy, 384 U.S. at 219:

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.

Mr. Justice Black observes that insofar as the Alabama statute is construed to prohibit the press from praising or criticizing the government, it frustrates the informing function of the press. But all this is familiar theory. What makes the *Mills* case something of a departure, and in its own way quietly original, is an interesting commentary by Justice Black. In rebutting Alabama's claim that the legislature's aim was a constitutionally permissible one—to purge the air of propaganda and induce momentary reflection in a brief period of tranquility before election day—Justice Black suggested that this argument failed on its own terms since 'last-minute' charges could be made on the day before election and no statutory provision had been made for effective answers, *Id.* at 220: 'Because the law prevents any adequate reply to these charges, it is wholly ineffective in protecting the electorate 'from confusive last-minute charges and counter-charges."

This statement suggests a substitution of the sensitive query 'Does the statute prohibit or provide for expression?' for the more wooden and formal question 'Does the statute restrain the press?' It is of course clear that *Mills* did not grant a constitutionally endorsed statute to legislative or judicial provisions conferring a right of access to assure debate. Quite the contrary, Justice Black prefaced his discussion of the significance of lack of opportunity to reply to 'last-minute' charges with the remark that the state's argument about the reflective intent of the statute is illogical '*even if it were relevant* to the con-

stitutionality of the law.' But it is the writer's contention that the existence of adequate opportunity for debate, for charge and countercharge, is an extremely relevant consideration in any determination of the constitutionality of legislation in this area. Justice Black's inquiry into the pragmatics of debate is an encouraging step in this direction."

Barron, *Access to the Press — A New First Amendment Right*, 80 Harv.L.Rev. 1641 at 1672-73 (1967).

In summary, assuming that the doubts that have been placed on the "finality" of the judgment below by Appellant's jurisdictional statement can be removed by the filing of a further statement by Appellant, the federal constitutional issues presented by this appeal are substantial. Accordingly, Appellee moves this Court, after a full consideration of the federal constitutional issues involved, to affirm the judgment below, or in the alternative, in the event "finality" problems are not absolutely resolved, to dismiss this appeal.

Respectfully submitted,

TOBIAS SIMON
TOBIAS SIMON and
ELIZABETH DuFRESNE
1492 South Miami Avenue
Miami, Florida 33130

JEROME A. BARRON, ESQ.
720 20th St.
Washington, D.C. 20006

CERTIFICATE OF SERVICE

I, TOBIAS SIMON, as a member of the Bar of the Supreme Court of the United States, hereby certify that a true and correct copy of the foregoing Appellee's Response and Motion to Affirm Judgment or Dismiss the Appeal, was mailed by U.S. Mail this 14th day of December, 1973, to PAUL & THOMSON, Attorneys for Appellant, 1300 First National Bank Building, Miami, Florida 33131.

TOBIAS SIMON